

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

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FILE: B-210210

DATE: September 14, 1983

MATTER OF: Commodity Futures Trading Commission--
Donations under Settlement Agreements

DIGEST:

The Commodity Futures Trading Commission lacks authority to adopt proposed practice of accepting a charged party's promise to make an educational donation as all or part of a settlement agreement. Donations would be contractually tailored to aid in the fulfillment of one of the Commission's statutory goals, establishing and maintaining research and information programs. Such donations are not reasonably related to prosecutorial authority.

This decision is in response to a request for our opinion regarding the legality of the Commodity Futures Trading Commission's (Commission) proposed new policy for the settlement of cases brought under prosecutorial power provided it by the Commodity Exchange Act, as amended, 7 U.S.C. §§ 9, 13b (1976). The proposal would allow the Commission to accept a charged party's promise to make a donation to an educational institution as all or part of a settlement agreement. The donation, as committed under the settlement agreement, would, in turn, aid in the accomplishment of one of the Commission's statutory functions: to "establish and maintain research and information programs to * * * assist in the development of educational and other informational materials regarding futures trading * * *." 7 U.S.C. § 22(a) (1976).

The Commission perceives the proposal as a way of achieving its educational goals by means other than its own direct fiscal outlays. The promise to make such a donation as part of a settlement agreement would not involve an actual transfer of funds to the Commission. As explained below, we conclude that the Commission would exceed its prosecutorial authority were it to implement the proposed policy.

In its request, submitted for the Commission by its General Counsel, the Commission asks that we consider whether

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the proposed plan would violate 31 U.S.C. § 3302 (formerly 31 U.S.C. § 484) which requires agencies to deposit money receipts in the Treasury unless they have specific authority to do something else with them. The Commission also asks if the proposal would violate any other statute or regulation.

The General Counsel states that under the Commission's prosecutorial discretion, it can settle a proceeding upon the settlement offer of the charged party. He further says that in such a settlement the Commission may accept terms and undertakings that go beyond those remedies specifically given the Commission. Also, according to the General Counsel, the Commission's willingness to consent to certain customary sanctions such as suspensions of license, cease and desist orders, and civil money penalties would not be affected by the proposed plan. The General Counsel stresses in explaining the plan that the Government would never receive the donated money and that the donations would be voluntary since a charged party can offer to settle without proposing a donation.

The Commission's authority is limited to the powers delegated to it by Congress. The Commodity Exchange Act, 7 U.S.C. § 1 et seq. (1976), as amended by the Commodity Futures Trading Commission Act of 1974, Pub. L. 93-463, 88 Stat. 1389 (1974), confers power upon the Commission to further the economic utility and efficiency of futures markets. These goals are accomplished through four major types of activities: market surveillance; research and education; registration, audits and contract markets; and enforcement. See Proposed Agricultural, Rural Development, and Related Agencies Appropriations for Fiscal Year 1983: Hearings before the Senate Appropriations Subcommittee, 97th Cong., 2d Sess. 903 (1982). Although the Congress has made various means of enforcement available to the Commission, they are specifically defined. They include: suspension of contract markets, 7 U.S.C. § 8(a) (1976); issuance of cease and desist orders, id. § 13a; and the imposition of criminal sanctions and civil penalties up to \$100,000, id. §§ 13, 13a. These actions are taken in the form of an adjudicatory proceeding, and pre-adjudication conferences are often held for purposes of settlement. Specific regulations govern the procedure by which offers of settlement are made. See 17 C.F.R. § 10.108 (1982).

While we agree that settlements may contain terms and undertakings that go beyond the remedies specifically given

the Commission, we believe there are limits to what may be accepted. In our view, settlement authority should be limited to statutorily authorized prosecutorial objectives: correction or termination of a condition or practice, punishment, and deterrence.

Accordingly, we are unable to agree that prosecutorial discretion extends to remedies unrelated to the correction of the violation in question and not within the ambit of the Commission's statutory authority. For this reason we take issue with the plan as a legitimate part of a Commission settlement agreement. Under the proposal, the charged party would donate funds to an educational institution that has no relationship to the violation and that has suffered no injury from the violation.

The General Counsel argues that the donation to an educational institution is not a penalty but a voluntary contribution. Despite the statement that the donations would not supplant the Commission's regular practice of imposing money penalties as part of a settlement, it is difficult to distinguish the proposed donations from money penalties. The money would be donated as a result of an enforcement action and in consideration of not imposing some further sanction or penalty. It is difficult for us to conceive of a situation under the proposed plan where one making the payment would not consider the payment a penalty. By a donation offer the charged party may be attempting to minimize his exposure to financial loss since he might expect the Commission to accept a smaller donation in lieu of all or part of the penalty it would have otherwise exacted. However, the donation is clearly not voluntary in any sense that would change its character. In our view, therefore, the Commission's authority to agree to money penalties is limited by the authority provided in 7 U.S.C. § 13a. Penalties imposed under this provision are collected by the Government and paid into the Treasury as miscellaneous receipts in accordance with 31 U.S.C. § 3302. The Commission may not circumvent the receipt of a penalty to accomplish a separate objective.

Accordingly, we conclude that the Commission is without authority to achieve its educational and information assistance function through the use of settlement agreements exacted from the exercise of its prosecutorial authority.

Milton J. Fowler
for
Comptroller General
of the United States